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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHINO ENGINEERING CONSTRUCTORS, INC.,

Plaintiff and Respondent,

v.

CHINO INDUSTRIAL COMMONS, LLC,

Defendant and Appellant.

E035092

(Super.Ct.No. RCV055509)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco, Judge. Reversed and Remanded.

Parilla, Militzok, Shedden & Garber, Paul H. Parilla and Marc Ettinger for Defendant and Appellant.

Kirkpatrick & Fields, Guy L. Kirkpatrick and C. Kerry Fields for Plaintiff and Respondent.

Defendant Chino Industrial Commons (CIC) appeals on the basis that the trial court abused its discretion by not granting CIC's motion for attorney fees pursuant to Civil Code section 1717.[1] We agree.

FACTS AND PROCEDURAL HISTORY

Plaintiff Chino Engineering Constructors, Inc. (CHINO), after a five-day binding arbitration[2] in which a panel of three arbitrators awarded approximately $1 million in damages, but which denied CHINO's request for attorney fees, pursued a cause of action against CIC and Developers Surety and Indemnity Company (DICO) for enforcement of labor and material bond (Bond Claim), which was not a subject at the arbitration, in order to recoup its attorney fees incurred in relation to the arbitration.[3] The Bond Claim was CHINO's sixth cause of action in its first amended complaint.[4] The trial court ruled in favor of CIC and DICO on the Bond Claim, ruling that CHINO could not recover its arbitration-related attorney fees under the labor and material bond (Bond).[5] CIC and

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

[2] The arbitration involved breach of two written contracts prepared by CHINO, neither of which contained an attorney fees provision.

[3] The labor and material bond issued by DICO in the amount of $1,394,154 contained an attorney fees provision.

[4] The causes of action included: (1) breach of written contracts, (2) work, labor and materials furnished, (3) quantum meruit, (4) money had and received, (5) foreclosure of mechanic's lien, and (6) enforcement of labor and material bond.

[5] At the time of the ruling the court also stated that CIC and DICO would not, similarly, be entitled to attorney fees. CIC contends that this statement was gratuitous and should not be looked at as a formal ruling on the issue of attorney fees because "[n]either CIC nor DICO had sought their [a]rbitration[-]related attorneys' fees and had not even filed a motion for the attorneys' fees which were incurred in the defense of the Bond Claim at the time that the [trial court] made this gratuitous comment." As the

[footnote continued on next page]

DICO subsequently filed their motion for attorney fees for those fees incurred in defense of the Bond Claim. The trial court denied their motion. DICO is not a party to this appeal.

CHINO and CIC entered into two written contracts wherein CHINO agreed to provide labor materials and equipment at CIC's project (Project). One contract dealt with the performance of onsite and offsite storm drain line work (Storm Drain Contract) and the other contract dealt with the installation of certain sewer lines (Sewer Contract). Neither the Storm Drain Contract nor the Sewer Contract contained an attorney fees provision, and the Bond issued by DICO pertained only to a portion of the Project.

CHINO began its work on both contracts in September 1999, and ceased work on March 2001, prior to the completion of the Project. Between November 30, 1999, and December 31, 2000, CHINO submitted nine invoices to CIC for payment. Thereafter, CHINO recorded a mechanic's lien with the San Bernardino County Recorders Office (Mechanic's Lien).[6]

On June 12, 2001, CHINO filed its complaint against CIC, DICO and others alleging six causes of action. Thereafter, CHINO filed a first amended complaint.

[footnote continued from previous page]
denial of attorney fees to CIC was in error despite the timing of the ruling, we deem this line of argument to be inconsequential and not the subject of our discussion.

[6] The Mechanic's Lien alleged that there was $1,570,719.93 due and owing from CIC to CHINO. On May 2, 2001, CHINO executed a partial release of the Mechanic's Lien as to two lots in exchange for a $200,000 payment, leaving the then-claimed balance due and owing under the Mechanic's Lien at $1,370,719.93.

The Bond Claim had been stayed to allow CHINO and CIC to arbitrate their disputes per the arbitration provisions contained in both the Storm Drain Contract and Sewer Contract. Between February 3 and February 7, 2003, CHINO and CIC arbitrated the claims identified in the first five causes of action in the first amended complaint.

On February 24, 2003, the arbitrators issued their interim statement of decision, wherein CHINO was awarded $969,927.32, and prejudgment interest at 10 percent per annum. In addition, because there was no attorney fees provision in the contracts between the parties, each side was ordered to bear its own attorney fees. Two months later, the arbitrators issued their second interim statement of decision, wherein CHINO was awarded costs in the sum of $14,843. Thereafter, CIC paid CHINO $1,177,135.12 which represented 100 percent of the arbitration award, including interest, costs and the retention.

On May 15, 2003, CHINO filed its request for dismissal of the first five causes of action. The trial on the remaining cause of action, the Bond Claim, occurred on August 18, 2003. The trial court decided that CHINO was not entitled to recover under the Bond Claim, finding that (1) CHINO's recordation of the Mechanic's Lien was inconsistent with CHINO's position that the project was a public works project and (2) the language in the attorney fees provision of the bond did not apply to CHINO. In addition, the trial court found that CHINO was "not entitled to recover attorney's fees and award[ed] judgment of no liability in favor of the defendants." The trial court also stated, "And so the record is clear, because the defense at some point indicated a desire to recover

attorney's fees, they are likewise denied to the defendant." Formal judgment was thereafter entered on September 18, 2003.

On October 14, 2003, CIC and DICO filed their motion for postarbitration attorney fees (Motion). CHINO opposed this Motion, contending that as a "general contractor it was pursuing its potential recovery of attorney's fees on a payment and performance bond and that the [trial court] had ruled that defendant[s were] not entitled to attorney's fees." Thereafter, CHINO and CIC executed a stipulation to bifurcate defendant's Motion for attorney fees. Accordingly, the only issue pending before the trial court was whether CHINO was liable to CIC and DICO for the attorney fees which were incurred in defending against the Bond Claim.

On November 19, 2003, the trial court heard and denied the Motion. On December 11, 2003, the order denying the Motion was filed. On December 22, 2003, CIC and DICO served a notice of entry of the order. This appeal followed that ruling.

DISCUSSION

I. CIVIL CODE SECTION 1717 AND "ACTION ON A CONTRACT"

A. Standard of Review

The parties have not discussed in their briefs what the applicable standard of review is as to the issue of whether an action on a Bond is an "action on a contract" within the meaning of section 1717. "On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory

construction and a question of law. [Citations.]" (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) Thus, as to the issue whether an action on the bond is an "action on a contract," which is a pure question of law, the proper standard of review is de novo. (See *Snyder v. Marcus & Millichap* (1996) 46 Cal.App.4th 1099, 1102.)

B. An Action on a Bond Is an "Action on a Contract"

CHINO contends that the trial court properly denied CIC's Motion for attorney fees, because CHINO's sixth cause of action, "Bond Claim," was not an "action on a contract" within the meaning of section 1717. We disagree.

Section 1717, subdivision (a), provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] . . . [¶] Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit."

"By its terms, therefore, Civil Code section 1717 has a limited application. It covers *only* contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce *that* contract. Its only effect is to make an otherwise unilateral right to attorney fees reciprocally binding upon all parties to actions to enforce the contract. [Citation.] Civil Code section 1717 necessarily assumes the right to enter into agreements for the award of attorney fees in litigation, a right which it in fact derives

from Code of Civil Procedure section 1021. Because of its more limited scope, Civil Code section 1717 cannot be said to supersede or limit the broad right of parties pursuant to Code of Civil Procedure section 1021 to make attorney fees agreements." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.)

C. Legislative Intent of Section 1717

The fundamental purpose of section 1717 is to "'. . . insure mutuality of a prevailing party's access to an award of attorney fees. As long as an action "involves" a contract, and one of the parties would be entitled to recover attorney fees under the contract if that party prevails in its lawsuit, the other party should also be entitled to attorney fees if it prevails, even if it does so by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract. [Citations.] [Citation.]" (*Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 545.) Section 1717 has been viewed as a tool "to discourage overreaching attorney fee claims . . . ." (*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 464.) Otherwise "'[o]ne-sided attorney's fees clauses [could] thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims. [Citations.] Section 1717 was obviously designed to remedy this evil.' [Citations.]'" (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1188.) Section 1717 was "designed to assure fairness between the parties." (*M. Perez Co., Inc., supra,* at p. 469.)

The policy behind section 1717 demands that a successful defendant be given the reciprocal benefit of "mutuality" in successfully defending against a claim where there is a contractual provision for attorney fees. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599,

610-611, see also *Milman v. Shukhat*, *supra*, 22 Cal.App.4th at p. 545.) It would certainly be counter to the strong policy and legislative intent of section 1717 of ensuring "mutuality" to deny a party the reciprocal compensation of attorney fees who successfully defends against a claim where it was allegedly liable for attorney fees simply because the party who brought its "action on a contract" called its cause of action by a name different from "breach of contract." (See *Milman*, *supra*, at p. 545.) The policy and legislative intent of section 1717 demand encompassing of both (1) breach of contract suits and (2) actions necessarily involving and based on a contract. (See *Santisas*, *supra*, at pp. 610-611; see also *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1143-1149, for a discussion at length concerning the legislative history and policy of section 1717; *Milman*, *supra*, 22 Cal.App.4th at p. 545; *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 40.)

Concerning the relationship between performance bonds and contracts "[i]t long has been settled in California that where a bond incorporates another contract by an express reference thereto, 'the bond and the contract should be read together and construed fairly and reasonably as a whole . . . .' [Citations.]" (*Cates Construction, Inc. v. Talbot Partners, supra,* 21 Cal.4th 28, 39-40.)

In CHINO's first amended complaint, it sued CIC, through binding arbitration, on the first five of six causes of action. In that complaint, CHINO referred to the attorney fees provision in the Bond. All of the causes of action were based on violations of the Storm Drain Contracts and Sewer Contracts by CIC. After dismissing the first five of six causes of action pursuant to the arbitration, CHINO pursued its sixth cause of action

against CIC and DICO. CHINO requested that attorney fees be paid to it pursuant to the provision in the Bond on the theory that attorney fees and costs incurred during collection of the balance owed to them on the contracts remained due.

In support of its Bond Claim, CHINO relied solely on *Liton Gen. Engineering Contractor, Inc. v. United Pacific Insurance* (1993) 16 Cal.App.4th 577. In *Liton Gen. Engineering Contractor, Inc.,* the court ordered the surety to pay attorney fees to the subcontractor. (*Id.* at p. 585.) The court concluded that the "action on the bond" in that case was an "integral aspect" of the arbitrated breach of contract claim. (*Ibid*.) CHINO, by solely relying on *Liton Gen. Engineering Contractor, Inc.* was effectively asserting the same. Also, in so pursuing the Bond Claim, CHINO put CIC at risk of being potentially liable for attorney fees. Accordingly, we find that CHINO's "Enforcement of Labor and Material Bond" action is an "action on a contract" within the meaning of section 1717. This determination is consistent with the legislative intent and policy of "mutuality" underlying section 1717. (See, e.g., *Milman v. Shukhat*, *supra*, 22 Cal.App.4th at p. 545.)

D. A Performance Bond is a Type of Contract and is Governed by Similar Law to that of "Other Types of Contracts"

Our high court has recognized (1) that performance bonds are contractual obligations as to the parties involved, and (2) the similarities between performance bonds and other types of contracts. (*Cates Construction, Inc. v. Talbot Partners*, *supra*, 21 Cal.4th at pp. 34, 38-49.) *Cates Construction, Inc.* dealt with "issues relating to the contract and tort liability of a commercial surety to a real estate developer under a bond

guaranteeing the contract performance of a general contractor on a multimillion dollar condominium construction project." (*Id.* at p. 34.) In *Cates Construction, Inc.*, our high court held that a "bond . . . *contractually obligates* the surety to pay damages . . . ." (*Ibid*., italics added.) The court went on to describe the purpose and characteristics of sureties and performance bonds, further showing the similarities with "other types of contracts": "A surety is 'one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor.' (Civ. Code, § 2787) A surety bond is a '"written instrument executed by the principal and surety in which the surety agrees to answer for the debt, default, or miscarriage of the principal."' [Citation.]" (*Cates Construction, Inc., supra*, at p. 38.)

Concerning the similarities between performance bonds and other types of contracts, and interpreting them interchangeably, our high court stated, "Performance bonds, like all contracts of surety, are construed with reference to the same rules that govern interpretation of *other types of contracts*. [Citation.] . . . Properly undertaken, construction of a performance bond '"does not mean that words are to be distorted out of their natural meaning, or that, by implication, something can be read into the *contract* that it will not reasonably bear; but it means that the *contract* shall be fairly construed with a view to effect the object for which it was given and to accomplish the purpose for which is was designed."' [Citations.]" (*Cates Construction, Inc. v. Talbot Partners*, *supra*, 21 Cal.4th at p. 39, italics added.)

Although it is clear that our high court determined that performance bonds and "other types of contracts" are similar in nature, construction, and interpretation, *Cates*

Construction, Inc. v. Talbot Partners, *supra*, 21 Cal.4th 28, 34, 38-49, was not presented with the issue of statutorily interpreting the "action on a contract" element of section 1717 and, thus, did not determine whether an "action on a performance bond" satisfied this element. In so characterizing performance bonds, however, our high court has made clear that performance bonds are contracts, distinguishable from "other types of contracts" only as a matter of use and not of substance. Thus, an "action on a performance bond" is simply a type of "action on a contract." (*Cates Construction, Inc. v. Talbot Partners*, *supra*, 21 Cal.4th at pp. 34, 38-49.)

CHINO contends, however, that its cause of action was an action for the "Enforcement of Payment Bond" and not an "action on a contract." We disagree.

This court has previously recognized that an action on a performance bond is an "action on a contract" within the meaning of section 1717: "The right . . . to attorneys' fees derives . . . from the circumstances that this is an action brought upon a bond."[7] (*Leatherby Ins. Co. v. City of Tustin* (1977) 76 Cal.App.3d 678, 690.) *Leatherby Ins. Co.* involved a controversy between a surety and the City of Tustin over, among other things, attorney fees. (*Id*. at p. 681.) At issue was whether the bonds provided a reciprocal benefit to the surety, pursuant to section 1717. (*Leatherby Ins. Co., supra,* at p. 681.) The bonds provided that "'. . . in case suit is brought upon this bond by the City [Tustin] or any other person who may bring an action on this bond, a reasonable attorney's fee, to

[7] Section 1717 has since been amended. However, the meaning of the applicable phrase "action on a contract" has not been changed; thus, the analysis thereof remains the same.

be fixed by the Court, shall be paid by Principal [White] and Surety [Leatherby].'" (*Id*. at p. 690.) We held that "section 1717 transform[ed] the foregoing into one allowing White or his subrogee Leatherby, in an action on a bond, to recover attorneys' fees, if two conditions are met. It must show that (1) it is the prevailing party, and that (2) this is an action on the bond." (*Leatherby Ins. Co., supra,* at p. 690.) We conclude here, as we did in *Leatherby Ins. Co.*, that an action on a performance bond may satisfy the threshold "action on a contract" requirement of section 1717. (See also *Xuereb v. Marcus & Millichap, Inc.*, *supra*, 3 Cal.App.4th at p. 1342.)

Such a holding is consistent with the legislative intent of section 1717, because (1) a performance bond is based on an underlying contract, and (2) a performance bond is a type of contract and is governed by similar law to that of "other types of contracts." (See *Cates Construction, Inc. v. Talbot Partners*, *supra*, 21 Cal.4th at pp. 34, 38-40, see also *Milman v. Shukhat*, *supra*, 22 Cal.App.4th at p. 545; *Leatherby Ins. Co. v. City of Tustin*, *supra*, 76 Cal.App.3d at p. 690.)

In the case at bar, the Bond contained a provision similar to the one in *Leatherby Ins. Co.* The attorney fees provision in the Bond provided that: "[I]n case suit is brought upon this bond, [surety] will pay, in addition to the face amount thereof, costs and reasonable expenses and fees, including reasonable attorney's fees, incurred by City in successfully enforcing such obligation, to be awarded and fixed by the court, and to be taxed as costs and to be included in the judgment therein rendered." We find, therefore, that the present action is an "action on a contract" within the meaning of section 1717,

because "Enforcement of Labor and Material Bond" is an "action on a bond." (*Leatherby Ins. Co. v. City of Tustin*, *supra*, 76 Cal.App.3d at p. 690.)

II. A SUCCESSFUL DEFENDANT IS ENTITLED TO ATTORNEY FEES UNDER SECTION 1717

A. Standard of Review

The applicable standard of review concerning the trial court's ruling denying defendant's Motion for attorney fees is abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) We presume the "trial court impliedly found 'every fact necessary to support its order.'" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115-1116, fn. 6, citing *Murray v. Superior Court* (1955) 44 Cal.2d 611, 619.) Thus, absent a manifest abuse of discretion, the determination of the trial court as to an award of attorney fees will not be disturbed. (*Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, 1151.) "An abuse of discretion is shown when it may be fairly said that the court exceeded the bounds of reason or contravened uncontradicted evidence. [Citation.]" (*Ibid*.)

B. The Denial of Defendant's Motion for Attorney Fees Was an Abuse of Discretion

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).) These costs do not include, however, the attorney fees which the prevailing party has incurred in the litigation unless (1) an agreement between the parties provides for the recovery of those fees, or (2) a statute creates a right of recovery. (Code Civ.

Proc., § 1021; *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1405, overruled on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) Where it is found that the prevailing party is statutorily entitled to attorney fees, although the determination of reasonable attorney fees to be awarded rests in the sound discretion of the trial court, the court may not completely deny fees to the prevailing party. (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1247.)

"To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed. [Citations.]" (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 611.)

In the case at bar, the reciprocal remedy of section 1717 was triggered by the presence of the attorney fee provision in the Bond: "[I]n case suit is brought upon this bond, [surety] will pay, in addition to the face amount thereof, costs and reasonable expenses and fees, including reasonable attorney's fees, incurred by City in successfully enforcing such obligation, to be awarded and fixed by the court, and to be taxed as costs and to be included in the judgment therein rendered."

The fact that CHINO was not a signatory to the Bond does not change our analysis: "Under some circumstances . . . the reciprocity principles of Civil Code section 1717 will be applied in action involving signatory and nonsignatory parties. [Citation.]"

(*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 380.) For example, if a nonsignatory plaintiff sues a signatory defendant on a contract, and if the nonsignatory plaintiff would have been entitled to attorney fees if it had prevailed, then the nonsignatory plaintiff is liable for attorney fees when it does not prevail. (*Sessions Payroll Management, Inc. v. Noble Consruction Co.* (2000) 84 Cal.App.4th 671, 679; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1292; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111; *Real Property Services Corp. v. City of Pasadena*, *supra*, 25 Cal.App.4th at p. 382.) According to the language of the Bond, it is clear, as the trial court found, that the attorney fees provision was applicable only as to the City of Chino. CHINO alleged, however, it was entitled to attorney fees as a "beneficiary" to the Bond. If CHINO's argument was accepted, and CHINO had prevailed, it would have been contractually entitled to attorney fees. Therefore, according to settled California law concerning the strong legislative intent of "mutuality" and nonsignatories, because (1) CHINO was unsuccessful in its "Bond Claim," (2) CHINO would have been entitled to attorney fees under the contract if it prevailed, and (3) CIC was the prevailing party on the Bond Claim (as CHINO concedes), CIC was entitled to attorney fees pursuant to section 1717. (See *Santisas v. Goodin, supra,* 17 Cal.4th at pp. 610-611, *North Associates v. Bell* (1986) 184 Cal.App.3d 860, 865.) Thus, the denial of CIC's Motion for attorney fees was an abuse of discretion under section 1717. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.)

DISPOSITION

The judgment is reversed and remanded to the trial court so that it may exercise its discretion, consistent with this opinion, in the fixing of reasonable attorney fees for defendant. Appellant is to recover costs on appeal.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

RICHLI
J.